IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. ~~76-5~~168

RECEIVED
AUG 4 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDWARD COLLINS DAVIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

MOTION TO PROCEED INFORMA PAUPERIS

Your petitioner moves the court that he be allowed to file this petition pursuant to Rule 53 of the Rules of this Court. His affidavit of indigency is attached hereto at page 27.

RECEIVED
AUG 4 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT

I, Edward Collins Davis, the petitioner herein, hereby apply for leave to proceed in the present cause without prepayment of fees or costs or security therefor. In support of my application, I declare under penalty of perjury that the following facts are true:

1. I am the petitioner in the present cause and I believe I am entitled to redress.

2. I do not possess or own any money, stocks, bonds, real estate or other property, either real or personal.

3. Because of my poverty, I am unable to pay the costs of the present action or give security therefor.

4. The nature of the action is a petition for writ of certiorari.

Date: August 3, 1976 Edward Collins Davis
Affiant

Sworn and subscribed to
before me this 3rd day
of August, 1976.

C. E. Satterwhite
Notary Public

C. E. SATTERWHITE NOTARY PUBLIC WAKE COUNTY, N.C.

My commission expires:

8-5-80

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. 76-5168

RECEIVED
AUG 4 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

EDWARD COLLINS DAVIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

PETITION FOR WRIT OF CERTIORARI

****

Attorney for Petitioner
Charles A. Lloyd

Smith, Patterson, Follin,
Curtis & James
704 Southeastern Building
Greensboro, North Carolina 27401
Telephone: (919) 274-2992

INDEX

	Page
Table of Citations	ii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2-3
Statement of Case	4
Argument	
I. The imposition of the death penalty under North Carolina's statutory scheme, upon petitioner, is violative of the Eighth and Fourteenth Amendments.	8
II. Permitting the state to introduce the Petitioner's patently absurd statement and denial made within a half hour after he had been arrested on charges of public intoxication while denying him the opportunity to prove through a state's witness a second statement made approximately twenty-five hours later denied your petitioner due process as guaranteed him by the Fourteenth and Fifth Amendments to the United States Constitution	8-9
Conclusion	13
Opinion of the Supreme Court of North Carolina	14-26
Affidavit of Petitioner	27

TABLE OF CITATIONS

CASES:	PAGE
Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973)	12
United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972)	12
United States v. Nixon, 418 U.S. 683, 709, 41 L.Ed. 2d 1039, 94 S.Ct. 3090 (1974)	13
Woodson v. State of North Carolina, _____U.S. _____, (75-5491, July 2, 1976) 44 L.W. 5267	8
STATUTES:	
N.C.G.S. 14-17	8
MISCELLANEOUS:	
McCormick, Evidence, 1954 Ed. §250	10-11
Stansbury, North Carolina Evidence, Brandis Revision, §178	10

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. _____

EDWARD COLLINS DAVIS,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

The petitioner, Edward Collins Davis, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, entered April 6, 1976, by filing the conviction of the petitioner by the Superior Court of Buncumbe County, entered March 28, 1975.

OPINION BELOW

The opinion of the Supreme Court of North Carolina, State v. Davis, 289 N.C., 223 S.E. 2d 296 (1976) is appended to this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I. Was the imposition of the Death Penalty under North Carolina's statutory scheme, upon petitioner, violative of the Eighth and Fourteenth Amendments?

II. Did permitting the state to introduce the petitioner's patenty absurd statement and denial made within a half hour after he had been arrested on charges of public intoxication while denying him the opportunity to prove through a state's witness a second statement made approximately twenty-five hours later deny your petitioner due process as guaranteed him by the Fourteenth and Fifth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AND

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson,

rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

STATEMENT OF CASE

The petitioner, Edward Collins Davis, was charged with the first degree murder of each of two North Carolina highway patrolmen. The two cases were consolidated for trial which began March 17, 1975, in Superior Court for Buncombe County and concluded almost two weeks later on or about March 28, 1975. Upon the evidence presented, the jury found the petitioner guilty of murder in the first degree on each count, and pursuant to N.C.G.S. 14-17, a mandatory death sentence was imposed by the Court. The facts of the case pertinent to this petition are as follows:

At trial, petitioner was represented by privately retained, out-of-state counsel. His appeal to the North Carolina Supreme Court was prosecuted as an indigent by court assigned counsel.

The evidence presented at trial showed that the defendant was arrested for driving while intoxicated on October 5, 1974. The arresting officer was Trooper Canipe, one of the two deceased highway patrolmen. Petitioner was handcuffed and taken by Trooper Canipe to the Courthouse in Asheville, North Carolina for a breathalyzer test. Sergeant Arledge, the other deceased highway patrolman, was the breathalyzer operator on duty in Asheville.

The petitioner was seen by a witness entering the Buncombe County Courthouse at approximately 7:50 p.m. with his hands cuffed behind him in the company of Trooper Canipe on the same day. At approximately 8:23 p.m. that evening, another officer found Sergeant Arledge and Trooper Canipe dead in the breathalyzer room. Expert testimony was later presented which established that Trooper Canipe and Sergeant Arledge had died of gunshot wounds and that it is highly probable that the bullets were fired from Trooper Canipe's service revolver. The petitioner was not present in the

breathalyzer room when the bodies were discovered.

At approximately 7:15 a.m. the next morning the petitioner was arrested by the Buncombe County Deputy Sheriff within five hundred feet of the actual police station on a charge of public intoxication. At 7:42 a.m. that same morning, the petitioner made a statement to James T. Maxey, an agent of the North State State Bureau of Investigation. That statement was admitted in evidence at trial, and in it petitioner said that on the day before he had been in the breathalyzer room with Officers Canipe and Arledge and that as he was talking to one of the officers a man with gray hair entered the room and shot both highway patrolmen and then ran. The petitioner told Agent Maxey and the other officers present at his interrogation that he picked up his "damn stuff" and ran. He spent the night hiding in the weeds and the briars and was walking to the courthouse to tell the police that he was innocent when he was arrested the next morning. This statement, made October 6, 1974, was introduced by the state into evidence.

After making the statement, the defendant was retained in custody.

The following morning, on October 7, 1974, the petitioner made another statement to Sergeant R. H. Cook who had been present during the making of the first statement. Evidence of this second statement, of October 7, 1974, was elicited during the trial in a voir dire examination of Sergeant Cook

In his October 7 statement, the petitioner stated that he wanted to get things straight and did not wish to embarrass his son who was a policeman in Florida. He stated that Officer Canipe had brought him to the breathalyzer room and Sergeant Arledge was seated in the room when they arrived. Sergeant Arledge made a telephone call and at the conclusion of the call told the petitioner "Mr. Davis, you are not

even supposed to be driving in the state of North Carolina. Your license have (sic) been permanently revoked." Trooper Canipe was filling out a form and handed it to the petitioner with instructions that he sign it. The petitioner told Trooper Canipe to sign it himself and thereupon Canipe pulled his gun and shoved the petitioner in the corner and told him to sign the paper or he would blow his heart out. A scuffle ensued and the gun fired twice. Petitioner then told Sergeant Cook that he realized at that time that he was responsible for the officers' death and that he grabbed various items in the room which he thought might identify him and ran.

Sergeant Cook, who had been present during both the statement of October 6 and October 7, was tendered for purposes of cross-examination by the state. No direct evidence was elicited from him. Defense counsel's attempt to elicit the second statement from Sergeant Cook was objected to by the prosecuting attorney, and the objection was sustained. Agent Maxey, from whom the state elicited the first statement, said that he was not present during the time that the second statement was taken.

The state presented other circumstantial evidence which linked the petitioner to the homicide, including various items found in the petitioner's pockets at the time of his arrest and items belonging to the deceased officers.

The defendant offered no evidence.

After instructions from the Court, the jury retired. During the course of their deliberations, the jury returned to the courtroom three times; once to collect certain exhibits, and twice for additional instructions; first on second-degree murder and then on first-degree murder.

A verdict of guilty on both counts was returned and two mandatory death sentences were imposed by judgment.

Thereafter, the petitioner appealed his conviction to the North Carolina Supreme Court. On April 6, 1976, that Court affirmed the conviction.

REASONS FOR GRANTING WRIT

In its present posture, this case presents two issues which require the attention of this Court. The first is clear. The petitioner was sentenced to death under the same statute held by this court to be unconstitutional. Woodson v. North Carolina, _____ U.S. ____ (75-5491, July 2, 1976), 44 L.W. 5267. Ordinarily a remand by this Court to the Supreme Court of North Carolina for proceedings not inconsistent with the court's decision in Woodson would be appropriate. However, the second issue presents important questions of basic fairness and due process in the conduct of state criminal trials which, as decided by the Supreme Court of North Carolina, appear to conflict partially with decisions of this Court, with Circuit Court decisions, and with the Fourteenth Amendment.

I. The Imposition of the Death Penalty under North Carolina's Statutory Scheme, Upon Petitioner, is Violative of the Eighth and Fourteenth Amendments.

The petitioner was sentenced to two death sentences pursuant to N.C.G.S. 14-17, the same statute found by this Court to be constitutionally deficit in Woodson v. State of North Carolina, _____ U.S. _____ (75-5491, July 2, 1976), 44 L.W. 5267. For that reason, imposition of the death penalty on your petitioner is unconstitutional.

The validity of the imposition of the death penalty in face of the Eighth and Fourteenth Amendments to the United States Constitution was preserved and passed on by the Supreme Court of North Carolina in your petitioner's appeal.

II. Permitting the State to Introduce the Petitioner's Patently Absurd Statement and Denial Made Within a Half Hour After He Had Been Arrested on Charges of Public Intoxication While Denying Him the Opportunity to Prove Through a State's

Witness a Second Statement Made Approximately Twenty-Five Hours Later Denied Your Petitioner Due Process As Guaranteed Him by the Fourteenth and the Fifth Amendments to the United States Constitution.

As was previously set forth in Statement of the Case hereinabove, approximately twelve hours after the deaths of the two highway patrolmen in this case, the petitioner was arrested on a charge of public intoxication. Within twenty-seven minutes of that arrest, he made a ridiculous statement concerning the homicides to investigating officers. He told the officers that when he was in the breathalyzer room, a man with gray hair entered and shot the two officers and then fled.

That statement was introduced by the State into evidence and its implausibility was thoroughly exploited by both prosecuting attorneys in their closing arguments to the jury.

The trial judge who admitted the statement into evidence found that it was made voluntarily and that while the defendant had the odor of alcohol on his breath he was not intoxicated when he made it. There is evidence in the record to support his findings and the voluntariness of this first statement was not challenged on appeal.

What was challenged on appeal was the failure of the trial court to admit the defendant's second statement, given approximately twenty-five hours later while he was still in custody. In that statement, the defendant presented a much more believable version of the facts, consistent with other evidence in the case.

On October 7, 1974, the defendant stated that in the breathalyzer room he made an insolent remark to Trooper Canipe, which was entirely consistent with his previous insolent remark at the time of his arrest ("I have a son who is a police officer, but he's not a son of a bitch like you"). In response to the remark in the

breathalyzer room, Canipe drew his gun and a struggle between the petitioner and him ensued. During that struggle, apparently both officers were killed.

At trial, the prosecution called Sergeant R. H. Cook who had been present at the time both statements were given to the stand. A voir dire examination in the absence of the jury was held, and Sergeant Cook gave testimony of both statements. Following the examination, the trial judge held both statements to be admissible in evidence. Thereupon, the jury was recalled. The state elected not to examine Sergeant Cook in the presence of the jury, but tendered him for purposes of cross-examination. On cross-examination, the petitioner's counsel attempted to elicit evidence of the second statement from Sergeant Cook. The trial court held that testimony inadmissible.

The last witness called by the state, was James T. Maxey, an agent of the North Carolina State Bureau of Investigation. He has been present during the time that the petitioner made his first statement but had not been present during the time that petitioner made his second statement. Agent Maxey was permitted to testify to the jury concerning the defendant's first statement.

On appeal to the Supreme Court of North Carolina, the petitioner submitted as error the failure of the trial judge to permit introduction of evidence concerning his second statement. The North Carolina Supreme Court affirmed the trial judge's ruling, holding the second statement to fall within that category of hearsay evidence known as "a self-serving declaration".

The truth is, of course, that both statements were "self-serving". The state was permitted to introduce the first, implausible statement as a false statement. See generally, Stansbury, North Carolina Evidence, Brandis Revision, § 178 and McCormick, Evidence, 1954 ed. §250. However, the proffered ground for excluding the second statement as "self-serving" is invalid,

especially under the facts of this case.

The rule against the admission of self serving declarations is an aberration and an unfortunate holdover from ancient common law evidentiary practices. As Professor McCormick has noted:

> " The doctrine that a party's out-of-court declarations or statements cannot be evidence in his favor, because 'self serving' seems to have originated as a counterpart and accompaniment of the rule, now universally discarded, forbidding parties to testify. When this latter rule of disqualification for interest was abrogated by statute, the accompanying rule against 'self serving' declarations should have been regarded as abolished by implication. Unfortunately it has lingered in the language of many opinions as a sweeping rule of exclusion.
>
> . . . Other courts, however, have applied here a supposed general rule of exclusion of self serving statements. This has been especially marked in an area where exclusion creates the greatest danger of injustice, namely in exclusion of the declaration of the accused, and homicide and assault cases, made before or after the event, of his peaceful intentions, or of his fear of the other party. . . . The courts which exclude assume that because made by a party and offered on his behalf the declarations are so likely to be dishonest as not to be worth hearing. This is the same discredited assumption that interested testimony is to be purged not weighed, which rested the ancient rule that parties could not testify." McCormick, Evidence, 1954 edition, Tp. 588-589.

The facts of the present case fall most squarely within Professor McCormick's criticisms of the exclusionary rule in question. Here, the petitioner made his first statement twelve hours after being arrested for driving while intoxicated and twenty-seven minutes after being seen staggering on a public street and having been arrested for public intoxication. The second statement, made a day later while still in custody, showed that he reacted in fear and self-defense to Officer Canipe's attack, and most importantly contains an admission that the petitioner knew that he was responsible for the deaths of the two officers. Unlike the first statement, the second statement does not seek to deny all guilt of the petitioner.

Undersigned counsel has been unable to discover a case from this court squarely on point. However, in a similar situation, the Seventh Circuit has spoken directly to the self serving declaration rule and held its absolute application invalid:

> "We think that a flat rule of exclusion of declarations of a party on the grounds that they may be described as 'self serving' even though otherwise free from objection under the hearsay rule and its exceptions, distracts from the fund of relevant information which should be available to the jury without, and compensation materially insuring the integrity of the trial process." United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), at 381 [Citations omitted].

Moreover, this court has showed no reluctance to set aside traditional state rules of evidence when those rules interfere with fundamental fairness and due process at trial. In Chambers v. Mississippi, 410 U.S. 284 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973), the court stated in conclusion:

> "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> We conclude that the exclusion of this critical evidence, coupled with the state's refusal to permit Chambers to cross-examine MacDonald denied him a trial in accord with traditional fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 302-303.

The flaw in the present case was in allowing the prosecution to present the jury with an incomplete picture of the defendant's statement, a statement given only minutes after he had been arrested for public intoxication, while denying the defense an opportunity to show another statement made twenty-five hours later, after a period of incarceration and when the defendant had presumably been completely sober. Admittedly, undersigned counsel has been unable

to discover any case similar to the present which has been held to violate the "rule of completeness". Those cases are generally collected in the annotation contained at 118 ALR 146. However, the present facts do present a peculiar situation in which prosecution was permitted to make a showing that was in fact misleading. As this court noted in United States v. Nixon, 418 U.S. 683, 709, 41 L.Ed. 2d 1039, 94 S.Ct. 3090 (1974):

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." [Emphasis supplied].

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted to review the decision of the Supreme Court of North Carolina.

This the 3rd day of August, 1976.

Attorney for Petitioner
Charles A. Lloyd
A Member of the Bar of the Supreme Court of the United States

Smith, Patterson, Follin,
Curtis & James
704 Southeastern Building
Greensboro, North Carolina 27401
Telephone: (919) 274-2992

RECEIVED
SEP - 2 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

****

No. 76-5168

****

EDWARD COLLINS DAVIS,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

****

MEM
RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

****

RUFUS L. EDMISTEN
Attorney General of
North Carolina

LESTER V. CHALMERS, JR.
Assistant Attorney General

N. C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 829-2011

ATTORNEYS FOR RESPONDENT

I N D E X

Page

Citation to Opinion Below.....1

Jurisdiction.....1

Questions Presented.....2

Constitutional and Statutory Provisions Involved.....2,3

Statement of Case.....3

Statement of Facts.....3

Arguments

I. DOES THE IMPOSITION OF THE DEATH PENALTY FOR THE CRIME OF MURDER IN THE FIRST DEGREE PURSUANT TO NORTH CAROLINA GENERAL STATUTE 14-17 VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?.....4

II. WAS THE PETITIONER DENIED DUE PROCESS AS GUARANTEED HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER WITHIN A HALF HOUR OF HIS ARREST ON CHARGES OF PUBLIC INTOXICATION WHILE DENYING HIM THE OPPORTUNITY TO PROVE THROUGH A STATE'S WITNESS A SECOND STATEMENT MADE APPROXIMATELY 25 HOURS LATER?.....4-7

Conclusion.....7

Appendix A, Opinion, State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976).....1a

TABLE OF CASES

Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973)..... 5,6,7

Edelman v. California, 344 U.S. 357, 97 L. Ed. 387, 73 S.Ct. 293 (1953).....7

Irvine v. California, 347 U.S. 128, 98 L.Ed. 561, 74 S.Ct. 381 (1954).....7

Picard v. Connor, 404 U.S. 270, 30 L.Ed. 2d 438, 92 S.Ct. 509 (1971).....7

State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976)....1,3

Street v. New York, 394 U.S. 576, 22 L.Ed. 2d 572, 89 S.Ct. 1354 (1969).....5

Woodson v. North Carolina, No. 75-5491 (July 2, 1976)...4,8

STATUTES

Page

28 U.S.C. Sec. 1257(3).....1,8

North Carolina General Statute Sec. 14-17.....3

CONSTITUTION OF THE UNITED STATES

Amendment V.....2,4,8

Amendment VIII.....2,4

Amendment XIV, Sec. 1.....2,4,8

IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-5168

EDWARD COLLINS DAVIS,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

The Respondent suggests that the Petitioner's Petition for Writ of Certiorari to the Supreme Court of North Carolina seeking review of an Opinion of the Supreme Court of North Carolina filed April 6, 1976, be granted as it relates to the death penalty. The Respondent further submits that Petitioner's Petition for Writ of Certiorari insofar as it asserts a denial of rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States be dismissed.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Buncombe County, North Carolina. In an opinion reported in State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976), the Supreme Court of North Carolina affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I.

DOES THE IMPOSITION OF THE DEATH PENALTY FOR THE CRIME OF MURDER IN THE FIRST DEGREE PURSUANT TO GENERAL STATUTES 14-17 ET. SEQ. OF THE STATE OF NORTH CAROLINA VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

II.

WAS THE PETITIONER DENIED DUE PROCESS AS GUARANTEED HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER WITHIN A HALF HOUR AFTER HIS ARREST ON CHARGES OF PUBLIC INTOXICATION WHILE DENYING HIM THE OPPORTUNITY TO PROVE THROUGH A STATE'S WITNESS A SECOND STATEMENT MADE APPROXIMATELY 25 HOURS LATER?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Amendment V

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provision of the General Statutes of North Carolina:

> §14-17. "Murder in the first and second degree defined; punishment.--A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison."

STATEMENT OF CASE

This was a criminal action tried at the March 3, 1975 Session of the Superior Court of Buncombe County upon two true bills of indictment, No. 74CR21567 and No. 74CR21568, duly returned at the December 3, 1974 Session by the Buncombe County Grand Jury. Upon call of the cases, the defendant, through his duly retained counsel, Robert DuPre, and his court-appointed counsel, Robert L. Harrell of the Public Defender's Office for the Twenty-Eighth Judicial District, entered a plea of not guilty as to each indictment. Upon motion of the State, and over objection of the defendant, the cases were consolidated for the purpose of trial. The jury for its verdict returned verdicts of guilty of first degree murder in case No. 74CR21567 and No. 74CR21568. In both cases the court pronounced the death sentence. In apt time the defendant gave notice of appeal to the Supreme Court of North Carolina. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the decision of the Supreme Court of North Carolina.

STATEMENT OF FACTS

The Respondent adopts as its own, as if fully set out herein, the facts as stated by the North Carolina Supreme Court in its opinion in State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976), a copy of which is attached to Respondent's Response as Appendix A.

ARGUMENT

I.

DOES THE IMPOSITION OF THE DEATH PENALTY FOR THE CRIME OF MURDER IN THE FIRST DEGREE PURSUANT TO GENERAL STATUTE 14-17 OF THE STATE OF NORTH CAROLINA VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

In accordance with the opinion of this Court entitled Woodson v. North Carolina, No. 75-5491, dated July 2, 1976 the Respondent will not argue this question. The Respondent suggests that the death penalty imposed upon the Petitioner under North Carolina's mandatory death sentence statute violates the Eighth and Fourteenth Amendments to the Constitution of the United States and therefore should be set aside. The Respondent suggests that the judgment of the Supreme Court of North Carolina insofar as it upheld the death sentence imposed upon the Petitioner be set aside, and that this case be remanded for further proceedings not inconsistent with the opinion of this Court in Woodson v. North Carolina, supra.

II.

WAS THE PETITIONER DENIED DUE PROCESS AS GUARANTEED HIM BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ADMISSION INTO EVIDENCE OF A STATEMENT MADE BY PETITIONER WITHIN A HALF HOUR AFTER HIS ARREST ON CHARGES OF PUBLIC INTOXICATION WHILE DENYING HIM THE OPPORTUNITY TO PROVE THROUGH A STATE'S WITNESS A SECOND STATEMENT MADE APPROXIMATELY 25 HOURS LATER?

The Respondent, State of North Carolina, respectfully submits that Petitioner's Petition for Writ of Certiorari claiming denial of his rights under Amendments Five and Fourteen to the Constitution of the United States should be denied. The Respondent submits that Petitioner failed to properly raise and fairly present, in the Supreme Court of North Carolina, the constitutional issue that he now seeks to have this Court decide. The Respondent respectfully submits that the record of the proceedings shows that this is the first occasion on which Petitioner and his counsel have even hinted that his previous evidentiary objection had a constitutional basis.

In Street V. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) this Court stated:

> "In order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§1257 (2), 1257 (3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L. Ed. 3, 5, 6, 66 S.Ct. 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, e.g. Bailey v. Anderson, supra; Chicago, I. & L. R. Co. v. McQuire, 196 U.S. 128, 131-133, 49 L. Ed. 413, 415, 417, 25 S. Ct. 200 (1905)."

In the concurring opinion of Mr. Justice White in Chambers v. Mississippi, 410 U. S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), it was stated:

> "We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother Rehnquist points out, the Court stated in Street v. New York, 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), that 'when ... the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary.'
>
> Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses."

The Respondent respectfully submits that Petitioner has not carried the burden of demonstrating to this Court that under the applicable state law his claim was properly before the

Supreme Court of North Carolina and was rejected, although silently, by the affirmance of the judgment and that since he has failed to do so this Court should not now entertain and decide the federal question that he now presses.

In the dissenting opinion of Mr. Justice Rehnquist in Chambers it is stated:

> "28 U.S.C. §1257 [28 USCS §1257] provides in pertinent part as follows:
>
> > 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> >
> > . . . . . .
> >
> > (3) By writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'
>
> We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a jurisdictional limitation, Cardinale v. Louisiana, 394 U.S. 437, 438, 22 L. Ed. 2d 398, 89 S. Ct. 1161 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort:
>
> > 'Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.' Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L. Ed 1149, 17 S. Ct. 709 (1897).' "

The Respondent respectfully submits that Petitioner by his objections during the trial raised the evidentiary question passed upon by the Supreme Court of North Carolina in its opinion (pp. 504-506) but that he failed to assert his constitutional claim in the trial court or in the appellate court and that he never at any time stated or alleged that his claim of error was constitutionally grounded. —

In Chambers, Mr. Justice Rehnquist further stated in his dissent:

"In Bailey v. Anderson, 326 U.S. 203, 90 L. Ed. 3, 66 S. Ct. 66 (1945), the petitioner argued in this Court that a state court condemnation award that failed to include interest from the date of possession denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment. This Court noted that in the state circuit court petitioner had requested that the award include interest from the date of taking, and that the circuit court without explanation had rejected this claim. But this Court went on to say:

> 'But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest.' 326 U.S. at 206, 90 L. Ed 3. "

In Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509, Mr. Justice Brennan, speaking for the Court, stated:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' Ex parte Royall, supra, at 251, 29 L. Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L. Ed. at 766; Davis v. Burke, 179 U.S. 399, 401-403, 45 L. Ed. 249, 250, 251, 21 S. Ct. 210 (1900)."
> (Emphasis added)

In Chambers, Mr. Justice Rehnquist in his dissent concluded by stating:

> "This Court under the Constitution has the extraordinarily delicate but equally necessary authority to review judgments of state courts of last resort on issues that turn on construction of the United States Constitution or federal law. But before we undertake to tell a state court of last resort that its judgment is inconsistent with the mandate of the Constitution, it behooves us to make certain that in doing so we adhere to the congressional mandate that limits our jurisdiction. Believing as I do that petitioner has not complied with 28 U.S.C. §1257(3) [28 USCS §1257(3)], I would dismiss the writ of certiorari."

See also Edelman v. California, 344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953) and Irvine v. California, 347 U.S. 128, 98 L. Ed. 561, 74 S. Ct. 381 (1954).

The Respondent, unlike counsel for the State of Mississippi in Chambers, in this response hereby asserts that the question raised by the Petitioner in his Argument No. II is not properly reviewable by this Court and that the Petition for Writ of Certiorari with respect to Argument No. II be dismissed.

CONCLUSION

The Respondent respectfully submits, based upon the foregoing response, that Petitioner's Petition for Writ of Certiorari to review the opinion of the Supreme Court of North Carolina insofar as it relates to the death penalty be allowed, and that this Court remand the case to the Supreme Court of North Carolina for further proceedings not inconsistent with this Court's opinion in Woodson v. North Carolina, No. 75-5491, filed July 2, 1976.

The Respondent further submits that Petitioner's Petition for Writ of Certiorari insofar as it asserts a denial of Amendments Five and Fourteen of the Constitution of the United States be dismissed for that the Petitioner has not complied with 28 U.S.C. §1257(3).

Respectfully submitted this 30th day of August, 1976.

RUFUS L. EDMISTEN
Attorney General

Lester V. Chalmers
Lester V. Chalmers, Jr.
Assistant Attorney General

N.C. Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-2011

ATTORNEYS FOR RESPONDENT,
STATE OF NORTH CAROLINA

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Petitioner by depositing same in the United States mail, postage prepaid, addressed to his attorney of record:

Mr. Charles A. Lloyd
Attorney at Law
704 Southeastern Building
Greensboro, North Carolina 27401

This 30th day of August, 1976.

RUFUS L. EDMISTEN
Attorney General

Lester V. Chalmers, Jr.
Assistant Attorney General

N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-2011

APPENDIX "A"

STATE OF NORTH CAROLINA v. EDWARD COLLINS DAVIS

No. 8

(Filed 6 April 1976)

1. Criminal Law § 77— introduction of in-custody statement — cross-examination as to subsequent self-serving statements

Where the State introduced evidence of in-custody statements made by defendant on 6 October, but introduced no evidence of in-custody statements made by defendant on 7 October which constituted self-serving declarations, and defendant did not testify or offer evidence, the trial court properly refused to allow defense counsel to elicit the self-serving 7 October statements on cross-examination, the State not having opened the door by presenting testimony on *voir dire* concerning the 7 October statements and testimony before the jury concerning the 6 October statements.

2. Criminal Law § 92— consolidation of charge for trial

The trial judge may consolidate for trial two or more indictments in which defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of another.

3. Criminal Law § 92— consolidation of charges — fair trial

In ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial, and if such consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated.

4. Criminal Law § 92— consolidation of murder charges

The trial court did not err in consolidating two murder charges against defendant for trial where the crimes were continuing criminal acts which permit the admission in evidence of each in the trial of the other, and defendant's unsupported statement that he was prejudiced because he was denied the election of testifying in one case but not in the other was insufficient to show abuse of discretion by the trial judge in consolidating the charges.

5. Homicide § 28— powder burns on hands — instruction on self-defense

In a prosecution for the murder of two police officers, evidence of powder burns on defendant's hands was insufficient to require an instruction on self-defense since such evidence at most permits an inference that defendant was engaged in a struggle for possession of the death weapon when it was fired but fails to show that (1) defendant was free from fault in bringing on the difficulty and (2) it was actually or apparently necessary for defendant to kill or use the force used in order to save himself from death or great bodily harm.

6. Homicide § 4— first degree murder defined

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

7. Homicide § 4— premeditation and deliberation

Premeditation is thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose.

8. Homicide § [illegible]— premeditation and deliberation — circumstances to consider

Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct of defendant before and after the killing; (3) the dealing of lethal blows after deceased has been felled and rendered helpless; (4) the vicious and brutal manner of the killing; and (5) the number of shots fired.

9. Homicide § 21— premeditation and deliberation — sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant, after premeditation and deliberation, formed a fixed purpose to kill two police officers in a breathalyzer room and thereafter accomplished that purpose where the evidence was sufficient to support reasonable inferences that: (1) defendant was highly resentful and belligerent when he was taken into custody; (2) both

officers were at all times engaged in the execution of their sworn duty and did nothing to provoke an assault on them by defendant; (3) defendant forcefully obtained one officer's pistol and brutally shot him three times with at least one of the shots being fired after the officer had been felled and rendered helpless; (4) defendant shot the second officer who was sitting at his desk with his pistol holstered; and (5) without offering any aid to the victims or notifying anyone of their plight, defendant took the first officer's pistol and watch and documents which identified defendant as being in the breathalyzer room and fled.

10. Constitutional Law § 36— death penalty — constitutionality

Imposition of the death penalty for first degree murder does not constitute cruel and unusual punishment.

APPEAL by defendant from *Snepp, J.*, 3 March 1975 Session of BUNCOMBE Superior Court.

Defendant was charged in separate indictments with the first-degree murder of Lawrence Canipe, Jr., and William Dean Arledge. The charges were consolidated for trial over defendant's objection and defendant entered a plea of not guilty to each charge.

The State offered evidence which tended to show the following:

On 5 October 1974, Lt. Tom Alexander, an employee of the Haywood County Sheriff's Department, was driving from Hendersonville to Waynesville when he observed defendant driving a black Buick automobile at an extremely high rate of speed. Patrolman Lawrence Canipe responded to Lt. Alexander's radio request for assistance and stopped defendant after a pursuit which covered approximately one mile. After the patrolman had obtained defendant's driver's license, he requested that defendant get out of his automobile and at that time the officer saw several weapons in defendant's car. Lt. Alexander stated that defendant was very talkative but that he was coherent. Defendant wanted to know why he was being handcuffed and, among other things, stated that he had a son who was a policeman but that he was not an S.O.B. like Lt. Alexander. The weapons were removed from the automobile and defendant was taken by Trooper Canipe to a room in the Buncombe County Courthouse where breathalyzer tests were usually administered.

Gary Moffitt, who worked in the basement of the courthouse, testified that at about 8:00 p.m. he heard three to five

noises which sounded like a door slamming in the vicinity of the breathalyzer room.

Trooper Thad May came to the breathalyzer room at about 8:23 p.m. on 5 October and found the door locked. He obtained a key and upon entering the room, he found the bodies of Sgt. Arledge and Trooper Canipe. Trooper Canipe's body was on the floor near the door and Trooper May observed that his pistol holster was empty and that there was a hole on the left side of Canipe's shirt. The fallen patrolman's shirt, trousers and shoes were bloody. Sgt. Arledge's body was in a kneeling position near a chair and Trooper May observed blood around a hole in the left side of his back below his shoulder and on his right arm and hand. Sgt. Arledge's fully loaded pistol was found in his holster. Trooper May also found a partially completed form used by the State Patrol in cases involving driving an automobile under the influence of intoxicants. Defendant's name had been entered on this form along with the notation "test refused." The form listed L. C. Canipe as arresting officer and Sgt. Arledge as breathalyzer officer.

Dr. John McLeod, a pathologist, testified that he performed autopsies on the bodies of both Canipe and Arledge and that in his opinion they both died as a result of gunshot wounds. According to his testimony Trooper Canipe had been shot three times and two of the bullets caused "through and through wounds" and one bullet lodged just beneath Trooper Canipe's skin. It was Dr. McLeod's opinion that this bullet did not completely exit because the trooper's back was pressed against some firm object when the bullet struck.

Arledge had sustained a gunshot wound to his chest and right arm. The bullet entered his left shoulder, penetrated his chest, exited through the anterior portion of the right shoulder, and then through the medial portion of his right arm.

SBI Agent Michael Lewis who investigated the shooting found a bullet and a copper casing beneath Canipe's body and a part of a Speidel watchband under his chest. A bullet was found in the door about seven inches from the floor and another bullet was found in the window sill.

Defendant was arrested on a charge of public drunkenness on the following morning and at that time a watch, later identified as the property of Trooper Canipe, was found in his possession. The State also offered evidence tending to show

that Trooper Canipe's pistol was found in an area near the courthouse along with several official forms bearing the names of the deceased officers and the name of defendant. It was established that soil found on defendant's clothes was similar to that found in this area.

SBI Agent James Maxey testified that in his opinion there were flame burns on the back of defendant's left hand and burned powder deposits on both of defendant's hands. SBI Agent Maxey also testified concerning a statement made to him by defendant on 6 October 1974. We will more fully consider this statement in the opinion.

Defendant offered no evidence.

The jury returned a verdict of guilty of first-degree murder on each charge and defendant appealed from judgments imposing mandatory death sentences.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

Robert L. Harrell, Assistant Public Defender, for defendant appellant.

BRANCH, Justice.

[1] Defendant contends that the trial judge committed prejudicial error by refusing to permit the State's witness, Sgt. Cook, to testify concerning a statement made by defendant.

By agreement of the parties, the court conducted a *voir dire* hearing concerning two statements made by defendant. One statement was made on 6 October 1974 and the other on 7 October 1974. The only witness offered on *voir dire* was Sgt. Cook.

Defendant does not challenge the *admissibility* of either of the confessions and properly so since there was ample evidence offered on the *voir dire* hearing to support Judge Snepp's finding "that the statements were made freely, intelligently, and voluntarily after the defendant had been fully advised of his rights under the law and had knowingly and intelligently waived those rights." The trial judge's findings and conclusions of law in turn supported his ruling that both confessions were admissible into evidence. *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 *cert. denied*, 396 U.S. 934; *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404.

After the trial court's ruling the jury returned to the courtroom and the district attorney did not examine Sgt. Cook before the jury but tendered the witness for cross-examination. Thereupon, defendant's counsel sought to elicit from the witness Cook the context of the confession allegedly made by defendant on 7 October 1974. The trial judge sustained the State's objection.

In order to keep our consideration of this assignment of error in proper perspective, we here note that the State subsequently offered the testimony of SBI Agent Maxey who related the statements made by defendant to Sgt. Rhew and the witness on *6 October 1974*. The statement as related by the witness Maxey was to the effect that defendant told the officers that he was in the breathalyzer room with two highway patrolmen when the door opened and an older man stepped inside the room and shot Trooper Canipe and then shot the second patrolman. Thereafter defendant grabbed his property and the pistol belonging to Trooper Canipe and fled. On cross-examination the witness stated: "I was not present when Mr. Davis made a statement the next day . . . I don't know whether there was a second interview or not."

The statement allegedly made by defendant on 7 October in substance was that after he was brought into the breathalyzer room the arresting officer filled out a form and told him to sign it and he told the officer to sign it himself. Thereupon the arresting officer pulled his gun and told defendant to sign or he would blow his heart out. A struggle ensued between the defendant and the officer during which the gun fired twice hitting the arresting officer. Defendant stated that he did not know how the other officer was hit. He thereafter took his belongings and the officer's gun and fled.

It is well settled that if the State offers a part of a confession, the accused may require the whole confession to be admitted into evidence. *State v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684; *State v. Edwards*, 211 N.C. 555, 191 S.E. 1; 2 Stansbury's N. C. Evidence § 187 (Brandis Rev. 1973). However, we are here faced with two separate conflicting statements made on different occasions.

In the case of *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677, this Court considered a question similar to the one here

under consideration. There, the Court, speaking through Justice Huskins, stated:

> Defendant's counsel proposed to ask a State's witness on cross-examination if defendant, when told by the witness that he was under arrest for rape, did not immediately deny his guilt. In the absence of the jury the witness stated that the defendant did deny it. The court sustained objection to the question and excluded the answer. This is the basis for defendant's sixth assignment of error.
>
> Defendant did not take the witness stand and offered no evidence whatever. The proposed cross-examination was therefore not competent to corroborate the defendant or, for that matter, any other witness. It was properly excluded as a self-serving declaration. . . .

Headnote No. 1 in the case of *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444, correctly and concisely states the pertient holding of that case. We quote:

> Where the State introduces testimony of statements made by defendant on a particular date, but introduces no evidence in regard to statements made by him on a subsequent date, defendant is not entitled to elicit from the State's witness testimony as to self-serving declarations made by defendant on the latter date, the State not having "opened the door" to such testimony.

Defendant argues that the State "opened the door" when Sgt. Cook testified on *voir dire* and when SBI Agent Maxey testified concerning the 6 October 1974 statement. We do not agree. Defense counsel had full opportunity to examine SBI Agent Maxey concerning the 6 October statement. It is noted, however, that this witness testified that he knew nothing about the 7 October statement. The State elected not to examine Sgt. Cook before the jury and the trial judge correctly refused to allow defense counsel to elicit this self-serving evidence on cross-examination at a time when the State had offered no evidence relating to it and defendant had not testified or offered evidence. This assignment of error is overruled.

Defendant assigns as error the ruling of the trial judge granting the State's motion to consolidate the two charges for trial.

[2] The general rule in this jurisdiction is that the trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721; *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652.

The usual objection to consolidation grows out of circumstances where one or more of several defendants takes the position that he or they will be prejudiced if forced to trial with the other defendants; however, we have also considered circumstances in which a single defendant objected to being tried upon several charges at the same time. We rejected such a contention in *State v. Jarrette, supra*, and in so ruling the Court, speaking through Justice Lake, stated:

> Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. 15-152 provides:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * * ."

The uncontradicted evidence is that the entire series of events comprising the four crimes with which the defendant is charged began at about 3:30 p.m., Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See: *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652; *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *State v. White*, 256 N.C. 244, 123 S.E. 2d

483; *State v. Chapman*, 221 N.C. 157, 19 S.E. 2d 250. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. *State v. Morrow*, 262 N.C. 592, 138 S.E. 2d 245; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. *State v. Yoes* and *State v. Hale*, 271 N.C. 616, 157 S.E. 2d 386.

We note parenthetically that G.S. 15-152 was repealed by Session Laws 1973, c. 1268, s. 26, however, this legislative change became effective July 1, 1975, subsequent to the trial of this case.

[3] It is true that in ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *Pointer v. United States*, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; *Dunaway v. United States*, 205 F. 2d 23. Nevertheless it is well established that the motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Jarrette, supra; State v. Yoes* and *Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386; *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44; *Dunaway v. United States, supra.*

[4] Defendant argues that he was prejudiced by the consolidation because without the consolidation of charges he would have had the election of testifying in one case without being forced to testify in the other.

In instant case, the charged crimes were obviously continuing criminal acts which permit the admission in evidence of each in the trial of the other. We are unable to discern any material reason why it would be to defendant's advantage to testify in one case and not the other. Certainly his unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate the charges for trial.

[5] Defendant next assigns as error the denial of his request for special instructions on self-defense. He contends that the

5a

State's evidence of powder burns on his hands was sufficient to show that defendant was engaged in a struggle for possession of the weapon when it was fired thereby requiring instruction on self-defense.

The general rule is that when the State or defendant produces evidence that defendant acted in self-defense, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830; *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750. Conversely, if the evidence is insufficient to evoke the doctrine of self-defense, the trial judge is not required to give instructions on that defense even when specifically requested. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461; *State v. McLawhorn*, 270 N.C. 622, 155 S.E. 2d 198.

A person may kill in self-defense if he be free from fault in bringing on the difficulty and if it is necessary, or appears to him to be necessary to kill so as to save himself from death or great bodily harm. The reasonableness of his belief and the amount of force required, must be judged by the jury upon the facts and circumstances as they appeared to the defendant at the time of the killing. *State v. Deck, supra; State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 *cert. denied*, 386 U.S. 1032; *State v. Smith*, 268 N.C. 659, 151 S.E. 2d 596; *State v. Fowler*, 250 N.C. 595, 108 S.E. 2d 892.

The facts of this case when taken in the light most favorable to defendant, as we are required to do, are insufficient to raise the issue of self-defense. *State v. Watkins, supra; State v. Finch*, 177 N.C. 599, 99 S.E. 409. At most the evidence permits an inference that defendant struggled for possession of the weapon before the fatal shots were fired. The record is void of evidence tending to show that: (1) Defendant was free from fault in bringing on the difficulty, (2) it was necessary or appeared to defendant to be necessary for him to kill or use the force used in order to save himself from death or great bodily harm.

We hold that under this evidence, the trial judge properly refused to instruct the jury on self-defense.

This record does not disclose that defendant's counsel moved for judgment as of nonsuit at the appropriate time or by his brief questioned the sufficiency of the evidence to show pre-

meditation or deliberation so as to sustain the verdicts of murder in the first degree. Nevertheless since these cases involve the imposition of the death penalty we, *ex mero motu*, elect to consider this question.

[6, 7] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. DuBoise*, 279 N.C. 73, 181 S.E. 2d 393; *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 *cert. denied*, 404 U.S. 840. Premeditation may be defined as thought beforehand for some length of time. "Deliberation means . . . an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose . . . . " *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. DuBoise, supra; State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423.

[8] In our opinion, there is ample evidence in the case *sub judice* to permit the jury to find that defendant unlawfully killed Sgt. William Dean Arledge and Trooper Lawrence Canipe with malice. Thus, the only remaining question is whether the evidence taken in the light most favorable to the State is sufficient to support legitimate inferences and findings by the jury that defendant, after premeditation and deliberation, formed a fixed purpose to kill Trooper Canipe and Sgt. Arledge and thereafter accomplished this purpose. *State v. Perry, supra; State v. Walters*, 275 N.C. 615, 170 S.E. 2d 484. Obviously premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. *State v. Walters, supra.* Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) Want of provocation on the part of the deceased, *State v. Hamby* and *State v. Chandler*, 276 N.C. 674, 174 S.E. 2d 385 *modified on other grounds*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862; (2) the conduct of defendant before and after the killing, *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817; (3) the dealing of lethal blows after deceased has been felled and rendered helpless, *State v. DuBoise, supra;* (4) the vicious and brutal manner of the killing, *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674; (5) the number of shots fired, *State v. Sparks,*

285 N.C. 631, 207 S.E. 2d 712 *pet. for cert. filed*, 43 U.S.L.W. 3392 (U.S., Nov. 29, 1974) (No. 669).

[9] The evidence in instant cases is sufficient to support reasonable inferences that: (1) When defendant was taken into custody, he was highly resentful and belligerent, (2) both Trooper Canipe and Sgt. Arledge were at all times engaged in the execution of their sworn duty and did nothing to provoke an assault upon them by defendant, (3) after forcefully obtaining Trooper Canipe's pistol, defendant brutally shot him three times and at least one of the shots was fired after the Trooper had been felled and rendered helpless, (4) defendant while engaged in one continuing criminal act shot Sgt. Arledge who was apparently sitting at his desk with his glasses on top of his head and with his pistol holstered, and (5) defendant without offering any aid to the fatally wounded men or even anonymously notifying anyone of their plight took Trooper Canipe's pistol, documents which identified defendant as being in the room where the killings occurred, a watch belonging to Trooper Canipe and fled.

In our opinion, when taken in the light most favorable to the State, the evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant after premeditation and deliberation formed a fixed purpose to kill Trooper Lawrence Canipe and Sgt. William Arledge and thereafter accomplished that purpose.

[10] Finally defendant contends that the death penalty is cruel and unusual punishment and therefore its imposition is constitutionally impermissible. These contentions have been considered and rejected by this Court in a host of recent decisions. We adhere to the holdings in those cases. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Armstrong*, 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Avery*, 286 N.C. 459, 212 S.E. 2d 142 (1975); *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Sparks*, *supra*; *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v.*

Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette*, *supra*.

Our careful examination of this entire record discloses that defendant has had a fair trial free from prejudicial error.

No error.